In The

Supreme Court of the United States

October Term, 1979

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No. 79-164

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SPIEGEL, INC.,

Appellant,

vs.

STATE OF SOUTH DAKOTA, ex rel. MARK V. MEIERHENRY, Attorney General for the State of South Dakota, and TRUDY PETERSON, for herself and all others similarly situated,

Appellees.

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On Appeal from the Supreme Court of South Dakota

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MOTION TO DISMISS APPEAL

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STATEMENT

This is a direct appeal from a Judgment of the South Dakota Supreme Court holding that Appellant's revolving charge account interest rates violated South Dakota law as established by SDCL 54-11-6, and remanding the case to the Trial Court with instructions to issue a permanent injunction ordering Spiegel to cease charging interest rates on its revolving charge account agreements in excess of the rate prescribed by SDCL 54-11-6, which statute has since been amended and currently authorizes Appellant to charge 18% per annum on revolving charge accounts, and further directing Appellant to reimburse the plaintiff Trudy Peterson for the few dollars of interest which it had collected from her.

Appellant Spiegel, Inc. ("Spiegel") filed a direct appeal to this Court under the provisions of 28 U. S. C. § 1257 (2), and the appeal was docketed in this Court on the 1st day of August, 1979.

Spiegel claims that the South Dakota rate of interest on revolving charge accounts is an unconstitutional burden on interstate commerce, principally for the reason that Spiegel claims that it cannot make any money on a 12% interest rate, and that the South Dakota interest rates should be higher or non-applicable. Spiegel asserts that this claim constitutes a substantial federal question.

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ARGUMENT

The appeal herein fails to present a substantial federal question for the following reasons:

South Dakota's interest rate on revolving charge accounts does not impose any unreasonable burden on interstate commerce.

In its Jurisdictional Statement, Spiegel argues that a legal interest rate of 12% per annum on revolving charge accounts is so severe a limitation as to effectively bar sales within South Dakota by Spiegel. Spiegel is apparently the only national merchandiser who shares this view, because the South Dakota Supreme Court quite obviously recognized and took judicial notice of the fact that many other national retailers who offer revolving credit operate within the law and have not been effectively barred from sales within South Dakota. These national merchandising entities include Sears, Roebuck & Co., Montgomery Ward, J. C. Penney Company, Mobil Oil Corporation, Phillips Petroleum, Standard Oil, Kerr-McGee, Texaco, and many others. Quite frankly, in many small, rural South Dakota communities, the three major national retail stores (Sears, Wards and Penneys) conduct only a catalog sales outlet. And yet these national stores operate within the limits of South Dakota law. This is precisely what the South Dakota Supreme Court had reference to in its opinion in this case where it stated:

> "To permit the governing law agreement between the parties to control the determination of whether or not South Dakota substantive law will apply would allow a foreign corporation the privilege of conducting its business in South Dakota upon more favorable condi-

> tions than are afforded to South Dakota corporations and would provide an effective means of circumventing legislation designed to protect citizens of South Dakota. . . ." (Appellant's Jurisdictional Statement, Appendix, p. A-6)

Spiegel apparently concedes that the decision of the South Dakota Supreme Court no longer presents a substantial federal question, by stating that the significance of the South Dakota Supreme Court's decision is reduced by the fact that the South Dakota Legislature has amended the statutes under attack, effective July 1, 1979, so as to change the rate of interest on revolving charge accounts from 12% to 18% per annum. Thus, Spiegel at this very moment is charging and collecting 18% per annum interest on its revolving charge accounts, and arguing to this Court that it needs 19.6% per annum to operate on ". . . an economically viable basis." Appellee submits that these facts on their face demonstrate that this case does not present a substantial federal question.

The second point raised by Spiegel in its Jurisdictional Statement is that the 12% finance charge limitation makes profitable retail credit sales operations impossible, but its argument under this point is one which is more appropriately addressed to the South Dakota Legislature. Apparently this same argument was made to the South Dakota Legislature in 1979, and accepted by that body because the law was in fact changed, and at the present time the Appellant operates within the State of South Dakota on the same or similar basis that it operates in dozens of other states *without objection*. Thus, it would appear that the issue as to the injunctive relief granted by the South Dakota Supreme Court is moot. Insofar as the order directing Spiegel to reimburse Trudy Peterson for the few dollars of interest it collected from her, it can hardly be said that this portion of the judgment raises a "substantial federal question". In summary, the Appellant's argument under this point is directed towards legislative policy, and Spiegel wants this Court to legislate interest rates in South Dakota under the guise of a "commerce clause" argument.

The third point raised by Appellant is that the burden upon interstate commerce is increased because Spiegel did not have prior notice of the application of South Dakota interest limitations on revolving charge accounts, and the judgment of the South Dakota Supreme Court acts as a retroactive penalty upon Spiegel. In making this argument, Spiegel completely ignores the clear, concise language of the South Dakota Supreme Court in its 1971 decision in *Rollinger v. J. C. Penney Company*, 86 S. D. 154, 192 N. W. 2d 699, at 705:

> "Hence, we give the caveat that from and after the date of this opinion, the use of revolving charge account agreements which result in charges exceeding maximum legal interest in this state are in violation of our usury statutes and subject to applicable penalties."

Rather than heed the warning of the Court, and comply with the law as hundreds of other retailers using credit did, Spiegel set about devising a document which it hoped could circumvent the mandate of the Court. By utilizing form over substance, Appellant clearly assumed the risk of the predicament in which it finds itself. It now seeks the assistance of this Court in extricating itself from this predicament.

CONCLUSION

For the foregoing reasons, Appellee moves that this Appeal be dismissed, and we respectfully submit that the questions presented by Appellant are clearly insubstantial and that the judgment of the Supreme Court of South Dakota should be affirmed.

Dated this 16th day of August, 1979.

Respectfully submitted,

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